

Amy Baggio, OSB #011920  
amy@baggiolaw.com  
Baggio Law  
621 SW Morrison, Suite 1025  
Portland, OR 97205  
Tel: (503) 222-9830  
Fax: (503) 274-8575

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

No. 3:16-cr-00051-BR-03

Plaintiff,

v.

DEFENDANT'S MEMORANDUM IN  
SUPPORT OF MOTION FOR BILL  
OF PARTICULARS

JOSEPH O'SHAUGHNESSY,

Defendant.

**A. Introduction**

This motion is one of several to be filed by defendants challenging the means, method, and execution of the Executive Branch's handling of the Malheur National Wildlife Refuge (MNWR) protest. This particular motion asks the Court to order the government to provide a bill of particulars pursuant to Fed. R. Crim. P. 7 and the Sixth Amendment so that the defendants may effectively and efficiently prepare their cases for trial.

Specifically, defendants argue in this motion that, in light of the voluminous discovery, hundreds if not thousands of potential witnesses, and the overly general allegations in the

indictment, that the defendants are in need of a Bill of Particulars in which the government will explain the basis for the allegations against the defendants with sufficient specificity so that the defendants will be able to adequately prepare for motion litigation and trial on the Court's expedited schedule.

### **1. Applicable Law**

Fed. R. Crim. P. 7(f) provides that the Court may direct the government to file a bill of particulars upon motion made by the defendant. The decision whether to order a bill of particulars is within the discretion of the trial judge. *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983). A bill of particulars provides details of the charges necessary to prepare an adequate defense, to avoid prejudicial surprise at trial, and to protect against a second prosecution based on the same facts. *United States v. DiCesare*, 765 F.2d 890, 897-98 (9th Cir. 1985); *Cook v. United States*, 354 F.2d 529, 531 (9th Cir. 1965); *United States v. Sollenberger*, 2007 WL 2908577, at \*1 (MD Pa Oct. 4, 2007) ("a bill of particulars should be granted if the government's failure to allege factual or legal information in the indictment significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial"). While a defendant is not entitled to know all the evidence the government intends to produce, the defendant is entitled to understand the theory of the government's case. *Yeargain v. United States*, 314 F.2d 881, 882 (9th Cir. 1963). *See also United States v. Valladares et al*, 3:10-cr-00010-MO (D.Or. 2010) (CR-174)(granting defense request for "memorandum outlining specific transactional and possession information" in relation to charged drug conspiracy). The Sixth Amendment guarantees:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington v. Texas*, 388 US 14, 19 (1967). In order to effectuate these rights, the defendants must adequately understand the government's allegations.

In the instant case, preparation of a defense is impaired by the lengthy time frame of the incident and constant surveillance therein (41 days of alleged criminal conduct), voluminous discovery (6 to 10 TB of data and reports of anywhere from 20,000 to 500,000 pages of documents), a firm trial date in September, and a lack of particularity in the indictment as charged. Accordingly, the current indictment is "insufficient to permit the preparation of an adequate defense." *DiCesare*, 765 F.2d at 897-98.

## **2. Requested Bill Of Particulars**

Specifically, the defendants seek a bill of particulars with respect to the following issues<sup>1</sup>:

### *a. Count One*

Considering the large number of defendants, the immense number of potential unindicted co-conspirators, the reference to evidence outside of the District of Oregon, and the mountain of discovery that must be reviewed to prepare the defense cases for trial, this indictment as written is hampering the defendants' ability to prepare for trial. Accordingly, the

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<sup>1</sup>While Mr. O'Shaughnessy is charged in only Count 1, other defenders have asked that additional requests be included in this motion. Therefore, while Mr. O'Shaughnessy is not charged in Counts 2-6, he offers these requests jointly, on behalf of codefendants. In addition, undersigned counsel understands that some defenders may file their own specific requests beyond those set forth in this memorandum.

defendants request the Court to direct the government to **provide a more specific description of their intended evidence as to who, what, where and when, including:**

- 1) In Count 1, introductory paragraph, specify what **“officers and employees”** of the BLM and FWS were the focus of the alleged conspiracy;
- 2) In Count 1, introductory paragraph, specify what **“duties”** the government alleges the defendants intended to prevent for both BLM and FWS;
- 3) In Count 1, in general, specify what acts, if any, by the individual defendants that the government intends to show for **proof of individual knowledge of a plan** to prevent by force, intimidation, and threats, officers and employees of the United States Fish and Wildlife Service and the Bureau of Land Management, from discharging their duties at the Malheur National Wildlife Refuge and other locations in Harney County, Oregon.
- 4) In Count 1, in general, specify what acts, if any, by individual defendants that the government intends to show for **proof of their agreement** with others to prevent by force, intimidation, and threats, officers and employees of the United States Fish and Wildlife Service and the Bureau of Land Management, from discharging their duties at the Malheur National Wildlife Refuge and other locations in Harney County, Oregon.
- 5) In Count 1, introductory paragraph, **name the individual defendant(s) with whom the individual defendants allegedly conspired.**
- 6) In Count 1, introductory paragraph, **name the other “persons known”** with whom the individual defendants allegedly conspired.
- 7) In Count 1, introductory paragraph, name the **“other locations”**

in Harney County, Oregon, where officers and employees of the United States Fish and Wildlife Service and the Bureau of Land Management were impeded or defendants allegedly planned to impede them from discharging their duties.

8) In Count 1, introductory paragraph, name the **“one or more of the conspirators”**<sup>2</sup> who are not named defendants who allegedly performed the overt acts, specifying those individuals as to each overt act alleged in subsections (a) through (h).

9) In Count 1, subsection (a), define **“certain demands”** alleged to have been made on November 5, 2015.

10) In Count 1, name **which defendants performed the overt acts**, specifying those individuals by name as to each overt act alleged in subsections (b) through (h).

11) In Count 1, specify **where outside the District of Oregon** that any overt act alleged in subsections (a) through (h) was allegedly performed.

12) In Count 1, subparagraph (b), name the **“other individuals known”** that defendants and conspirators allegedly recruited and encouraged to participate in the conspiracy.

13) In Count 1, subparagraph (c), in reference to the alleged travel to Harney County to effectuate the “goals of the conspiracy,” define **what goals** the government alleges **which defendants had** in traveling to Harney County.

14) In Count 1, subparagraph (d), specify **which defendants** the

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<sup>2</sup>Defendants acknowledge that courts have held that defendants are not *generally* entitled to disclosure of the names of all alleged co-conspirators. *DiCesare*, 765 F.2d at 898. However, the uniqueness of the current case requires disclosure of as much detail as possible in order to allow defendants to efficiently and effectively prepare for trial.

government alleges **brandished firearms** throughout Harney County.

15) In Count 1, subparagraph (d), specify **which defendants** the government alleges **carried firearms** throughout Harney County,

16) In Count 1, subparagraph (e), specify **which defendants** the government alleges **occupied the MNWR by force while using and carrying firearms**.

17) In Count 1, subparagraph (f), **identify the buildings**, if any, that the government intends to prove were “premises of the Malheur National Wildlife Refuge.”

18) In Count 1, subparagraph (g), **identify which defendants and conspirators refused to leave** the MNWR.

19) In Count 1, subparagraph (h) **identify which defendants and conspirators threatened violence** against anyone who attempted to remove them from the MNWR.

*b. Count Two*

1) In Count 2, name the **“others known”** who aided and abetted the named defendants in allegedly possessing or causing to be present a firearm or dangerous weapon in a federal facility located at the Malheur National Wildlife Refuge.

2) In Count 2, **identify the buildings**, if any, that the government intends to prove were “a federal facility located at the Malheur National Wildlife Refuge.”

3) In Count 2, **specify the items** constituting any “dangerous weapons” that the government intends to prove were “in a federal facility located at the Malheur National Wildlife Refuge.”

*c. Count Three*

1) In Count 3, name the **“others known” who aided and abetted** the named defendants to allegedly use and carry firearms during and in relation to a crime of violence.

*d. Count Five*

1) In Count 5, define **“related equipment”** referred to as property allegedly stolen.

*e. Count Six*

1) In Count 6, define **“property” allegedly depredated** by the excavation and use of heavy equipment.

2) In Count 6, specify by **precise location and description** the “archaeological site considered sacred to the Burns Paiute Tribe”.

**B. Conclusion**

Based on the foregoing, it is respectfully requested that the Court order the filing of a bill of particulars to allow the defendants to adequately prepare their cases for trial, currently scheduled to begin in less than five months.

Respectfully submitted on April 27, 2016.

/s/ Amy Baggio  
Amy Baggio, OSB #011920  
503-222-9830  
Attorney for Defendant O'Shaughnessy